SUPREME COURT, U.S.
Supreme Court, U.S.
FILED
APR 15 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

No. 1475.

OCTOBER TERM, 1970.

BARBARA J. FUHRMAN,
Administratrix of the Estate of Arthur J. Fuhrman,
Deceased, *et al.*,
Petitioners,

vs.

UNITED STATES STEEL CORPORATION
and
DEN NORSKE AMERIKALINJE, A/S,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION.

LUCIAN Y. RAY,
ROMAN T. KEENEN,
Attorneys for Respondent, United States Steel Corporation.

Of Counsel:

McCREARY, RAY & ROBINSON,
1550 Union Commerce Building,
Cleveland, Ohio 44115.

JOSEPH KEIG, JR.,
THOMAS O. MURPHY,
JONATHAN G. BUNGE,
Attorneys for Respondent Den Norske Amerikalinje, A/S.

PRICE, CUSHMAN, KECK & MAHIN,
134 South LaSalle Street,
Chicago, Illinois 60603,

JOHNSON, BRANAND & JAEGER,
2700 Terminal Tower,
Cleveland, Ohio 44113.

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BRIEF OF RESPONDENTS IN OPPOSITION.

COUNTER QUESTIONS PRESENTED.

1. Was the Court of Appeals correct in following the rule of *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), that findings are to be set aside as "clearly erroneous" where, upon the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been committed?

2. Was the Court of Appeals correct in excluding as incompetent expert psychiatric testimony where the expert examined the claimants solely to prepare himself to testify at trial and then testified to and based his opinion wholly upon the history and subjective symptoms related by the claimants, even though the history and subjective symptoms were substantially inconsistent with those related by the claimants on direct examination?

3. Was the Court of Appeals correct in ruling that, in the absence of any other evidence, earning capacity is to be determined by reference to actual earnings?

4. Was the Court of Appeals correct in following the rule of *Michigan Central R.R. v. Vreeland,* 227 U.S. 59 (1913), and every other Federal decision on the subject that no awards are to be made to widows for loss of consortium, care and guidance?

5. Was the Court of Appeals correct in requiring that the District Court discount awards of future damages to present value in accordance with *Chesapeake and Ohio Ry. Co. v. Kelly,* 241 U.S. 485 (1916)?

6. Was the Court of Appeals correct in holding that an award of prejudgment interest is not required in all maritime personal injury and death cases, but is a matter committed to the discretion of the Court?

COUNTER STATEMENT OF THE CASE.

Respondents strongly object to the Statement of the Case set forth in the Petition of Fuhrman, *et al.*, because it is irrelevant to the issues raised by the Petition, improper in that it refers to "facts" not in the record and insufficient in that it completely ignores those facts in the record which are relevant.

Rule 23(e) of this Court requires that a Petition for a Writ of Certiorari contain "a concise statement of the case containing the facts material to the consideration of the questions presented." Petitioners ignore this requirement. The decision of the Court of Appeals which the Petitioners ask this Court to review was concerned with awards of *compensatory* damages. Instead of stating the evidence introduced on this question of compensatory damages, Petitioners set forth purported "facts" taken from the decision of the District Court concerning punitive damages. One of the two shipowners involved in the awards of compensatory damages was not a party to the punitive damage proceedings. Den Norske Amerikalinje A/S did not participate in these proceedings because all parties had earlier stipulated Den Norske had no liability for punitive damages.

Further, and most importantly, the "facts" related by Petitioners are inaccurate and have already been found inaccurate by the Court of Appeals for the Sixth Circuit. The decision below awarding punitive damages was reversed in *United States Steel Corporation v. Fuhrman*, 407 F.2d 1143 (6th Cir., 1969), as "clearly erroneous." The claimants' Petition for a Writ of Certiorari in connection with the punitive damage decision was denied. *Fuhrman v. United States Steel Corp.*, 398 U.S. 958 (1970).

Petitioners prefer to rehash the punitive damage proceedings and engage in personal attacks upon Courts which have no connection with this case, i.e., the United States District Court for the Western District of Washington (Pet., pp 7-8, n. 13*), rather than discuss the facts relevant to the question of compensatory damages because the facts in the compensatory damage record provide no support for the arguments advanced by the Petition.

The instant Petition involves seven personal injury claims and three death claims arising out of the sinking of *The Cedarville* in May of 1965.** Judgments awarding

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* At pages 7 and 8 of the Petition, Petitioners state that the Court of Appeals below "adopted *in toto* the argument of U. S. Steel that Doctor Dillon was incredible because of what a commissioner has said in another case." This is entirely inaccurate. The Court of Appeals noted that Doctor Dillon, the Petitioners' psychiatric expert, has been discredited as "incredible," in *In Matter of the Petition of Keystone Tankship Corp.*, In Admiralty, No. 16,944, W.D. Wash., (1969). However, it expressly refused to proceed on the basis of this determination in those proceedings. The Court of Appeals stated (A14):

> "With particular reference to the claimants' psychiatric expert, shipowners argue that he was part of 'circle of advocacy' otherwise composed of the claimants and their attorneys, and that his testimony should be discredited as it was by the Commissioner in the *Matter of the Petition of Keystone Tankship Corp. and Keystone Shipping Co.*, In Admiralty, No. 16,994, United States District Court for Western District of Washington, Northern Division (the *Bunker Hill*). Were we sitting as the triers of fact, or were we not required by the law of the case as established in *United States Steel Corporation v. Fuhrman, Administratrix, supra* to follow the rule of *Gypsum*, the inclination to so discredit his testimony would be strong upon us. In the existing circumstances, however, we are required to accept that testimony unless we possess 'on the entire evidence . . . a definite and firm conviction that a mistake has been committed,' or unless we conclude his pertinent testimony was inadmissible in the premises and improperly received in evidence."

** Originally, ten death and twenty personal injury claims were filed in the limitation proceedings initiated by the ship-

(Continued on following page)

those claimants compensatory damages which were entered by the District Court in July of 1969 were reversed and remanded by the U. S. Court of Appeals for the Sixth Circuit in December of 1970. *Petition of United States Steel Corp.*, 436 F.2d 1256. Numerous issues were involved. The decision of the Court of Appeals was based upon a complete and thorough review of the record in the compensatory damage proceedings.

An attempt to set forth all facts relevant to this determination by the Court of Appeals would require hundreds of pages. However, a brief summary of the situation in the personal injury claims well illustrates the nature of problem confronting the Court of Appeals.

In the District Court, a total of $997,332 was awarded the seven personal injury claimants in amounts of from $251,976.00 (Holley) to $82,160.00 (Piechan). These awards were made even though the uncontroverted testimony of the claimants themselves and the uncontroverted documentary evidence showed that:

1. Except for the brief period immediately after the sinking when all surviving crew members of the *Cedarville* remained ashore waiting assignment, six of the seven claimants missed no time from work due to any condition which they claimed resulted from the sinking. The single exception, Holley, was absent only 14 days during the summer of 1965 after he was reassigned and lost no time from work thereafter.

2. All claimants had as good or better work records following the sinking as they had prior to May 7, 1965.

(*Continued from preceding page*)

owners below. All but the instant claims and two other death claims were settled on terms described by the District Court as "generous." The two other remaining death claimants have also filed Petitions for a Writ of Certiorari. *Lamp v. U. S. Steel Corp.*, No. 1370 (raising the single issue of prejudgment interest) and *Cook v. U. S. Steel Corp.*, No. 1497.

Five of the claimants returned to sailing for U. S. Steel within a month of the sinking and remained in this employment past the time of trial. Two of these men (Piechan and Holley) occupied the same positions they had held on May 7, 1965, positions which they had held for at least a decade prior to the sinking and from which there was no likelihood of promotion. The other three (Tulgetske, Idalski and Kierzek) had all been promoted between the sinking and the time of trial. The two men (Mulka and Przybyla) who did not return to sailing had not sailed regularly prior to the sinking and, after the sinking, took positions which offered more promise than sailing careers. All seven performed their work in an exemplary manner and without difficulty following the sinking. The earnings of all seven personal injury claimants have increased since the sinking.

3. Five of the claimants sought no medical treatment for the "disabling" conditions they claimed to have resulted from the sinking after they were examined at the insistence of U. S. Steel and treated for minor bruises and abrasions shortly after the sinking. The other two (Piechan and Holley) sought treatment for conditions which they claimed were caused by the sinking although both had sought similar treatment for similar complaints prior to the sinking.

4. The claimants returned to and participated in their community with at least as much effectiveness as before the sinking and their own lives underwent no significant change.

In the entire personal injury record, with respect to all seven claimants, the uncontroverted evidence was that these claimants had sustained:

1. No fractures, amputations, paralysis, burns or other such injuries;

2. No lost or decreased earnings;
3. No lost employment;
4. No failure to work steadily and regularly in their chosen occupation once claimants resumed work after the sinking;
5. No job demotions;
6. In the claims of Kierzek, Mulka, Przybyla, Tulgetske and Idalski, no visits to any doctor for any medical treatment once they had returned to work;
7. No determinations by any United States Public Health Service doctor or other treating physician that the claimants (with a limited exception of Holley) were at any time not fit for duty once they resumed employment after the sinking;
8. In the case of Holley, no determination by any doctor that Holley was at any time not fit for duty after August of 1965;
9. No hospitalization (except Holley who spent the night of the sinking in the hospital);
10. No requests for psychiatric treatment;
11. No operations for injuries causally related to the sinking;
12. No medical expenses;
13. No divorces, marital separations or other family disruptions;
14. No case of alcohol or drug addiction;
15. No complaints to employers, work supervisors, treating doctors or other persons outside claimants' immediate families of emotional ill-being.

Against this background, the Court of Appeals found that the awards below were "clearly erroneous," and reversed and remanded for further proceedings in the District Court.

The three death claims involved in this Petition (Fuhrman, Haske and Jones) presented a similar obvious and irreconcilable disparity between the evidence and the awards made by the District Court.*

Also in several instances the District Court simply refused to follow well-established principles of law even though it recognized its decision was in direct conflict with decisions of this Court and with decisions of the Court of Appeals for the Sixth Circuit. Thus, the District Court took upon itself the prerogative to make an award of pre-judgment interest in the death claims even though it recognized its decision (79):**

> "Squarely contradict[ed] the holding of our superior Sixth Circuit Court of Appeals in *Cleveland Tankers v. Tierney,* 169 F.2d 622 (6th Cir., 1948)."

In short, the Court of Appeals was confronted with a situation run amuck. Properly recognizing and exercising its responsibilities under the decisions of this Court, it fully and extensively reviewed the evidence and the applicable law and, after coming to the inescapable conclusion that the findings below were in many respects "clearly erroneous," reversed and remanded for further proceedings in the District Court.

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* Summaries of additional relevant facts in connection with both the personal injury and death claims with references to the appendix in the Court of Appeals are set forth in the Appendix.

** References in parenthesis without the prefix "A" or other indication of separate reference are to the Appendix filed in the Court of Appeals which Petitioners have filed in support of their Petition.

ARGUMENT.

I. A Finding is to Be Set Aside as "Clearly Erroneous" if the Reviewing Court, "Upon the Entire Evidence, is Left with the Definite and Firm Conviction that a Mistake Has Been Committed." The Court of Appeals Had Such a Conviction.

The Court of Appeals was fully aware of the scope of appellate review and the standards to be applied. When the punitive damages phase of this litigation was before that Court, it ruled that the provisions of Rule 52(a) F.R. C.P. were applicable and that the findings of fact should be adopted unless found to be "clearly erroneous." It then found the findings of fact "clearly erroneous." *United States Steel Corp. v. Fuhrman,* 407 F.2d 1143 (6th Cir., 1969). This Court denied certiorari. *Fuhrman v. United States Steel Corp.,* 398 U.S. 958 (1970).

In the instant phase of the litigation the Court of Appeals, in again applying that Rule, said (Pet., pp. A11-A12):

> "Before passing to a consideration of the separate items of damage itemized by the Commissioners in their determination of the claimants' awards, attention is directed to the issue presented concerning the scope of the present review. This issue was before us in the appeal dealing with the question of the allowance of punitive damages in the present case, and we therein determined that 'Rule 52(a) applied to the findings of fact of the District Judge * * * notwithstanding that he heard no live testimony at the trial. *Commissioner v. Duberstein,* 363 U.S. 278, 291; *United States v. United States Gypsum Co.,* 333 U.S. 363, 364, 365.' *United States Steel Corp. v. Fuhrman, Administratrix,* [407 F.2d 1143 (6th Cir., 1969)], cert. denied, 398 U.S. 958 (1970); see *Commissioner of Internal Revenue v. Spermacet Whaling & Ship-*

ping Co., 281 F.2d 646 (6th Cir., 1960). Thus at the very least, despite the view expressed in the separate concurrence in *Fuhrman* that the determination expressed therein on this point and in *Spermacet* constituted obiter dictum, the quoted conclusion is here controlling as the law of the case. Accordingly, we are here required to affirm the District Court unless we conclude its findings to have been 'clearly erroneous' under the definition provided by the Supreme Court:

> 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum, supra,* at 395.

It is against this yardstick that we measure the evidence of compensatory damages contained in the record."

This Court has reaffirmed the *Gypsum* test as recently as May of 1969. In *Zenith Corp. v. Hazeltine*, 395 U.S. 100, the Court, speaking through Mr. Justice White, said (p. 123):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948). See also *United States v.*

National Assn. of Real Estate Boards, 339 U.S. 485, 495-496, 70 S. Ct. 711, 717, 94 L. Ed. 1007 (1950); *Commissioner of Internal Revenue v. Duberstein,* 368 U.S. 278, 289-291, 80 S. Ct. 1190, 1198-1199, 4 L. Ed. 2d 1218 (1960)."

If a reviewing court is left with the conviction that a mistake has been committed it not only has the power but the duty to reject the findings of the district court. In *Arnolt Corp. v. Stansen Corp.,* 189 F.2d 5 (7th Cir., 1951) the Court stated at page 9:

> "It is undoubtedly true that a court of review under Federal Rules of Civil Procedure, rule 52(a), 28 U.S.C.A. has the power, even the duty, in a proper case, to overturn the findings of the trial court. * * *"

In support of the above conclusion the Court of Appeals quoted the "clearly erroneous" language in the *Gypsum* case, *supra.* Also see, *Soderhamm Mach. Mfg. Co. v. Martin Bros. Con. & T. Pr. Corp.,* 415 F.2d 1058, 1069 (9th Cir., 1969).

This standard applies even where findings of fact based, in whole or in part, upon oral testimony are being reviewed. *S/S Silberblatt, Inc. v. Seaboard Surety Company,* 417 F.2d 1043 (8th Cir., 1969); *Krause v. Sud-Aviation Societe Nationale De Constructions Aeronautiques,* 413 F.2d 428 (2nd Cir., 1969); *Texas Company v. R. O'Brien & Co., Inc.,* 242 F.2d 526, 529 (1st Cir., 1957).

In their attempt to postulate a conflict between the decision below and the decisions of other courts, including the decision of this Court in *McAllister v. United States,* 348 U.S. 19 (1954), Petitioners neglect to point out that that landmark decision, upon which they so heavily rely, adopted the *Gypsum* definition as the standard to be applied in determining whether a finding is "clearly erroneous." This Court stated (p. 20):

> "The first question presented is whether the Court of Appeals in reviewing the District Court's findings applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. [citations omitted] *A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, United States v. Oregon Medical Society,* 343 U.S. 326, 339; *United States v. United States Gypsum Co.,* 333 U.S. 364, 395. * * *" (Emphasis supplied.)

The decisions cited on pages 2 and 3 of the Petition all involved an acceptance of the findings of the triers of fact because, under the *Gypsum* standard, such findings were not established to be "clearly erroneous"; in none of the cases was the appellate court left with a "definite and firm conviction that a mistake had been committed." It is pure sophistry to contend that they are in conflict with the decision below.

It is apparent from an examination of the Opinion below that the rejection by the Court of Appeals of the findings of the District Court was based upon a careful consideration of all of the evidence. Reference need be made to the evidence relating to only one of the claimants, Stanley Mulka, to demonstrate that "a mistake had been committed."

Stanley Mulka was on his first voyage at the time of the sinking of the Cedarville. Prior to his experience as a seaman he had graduated from high school and had studied at a Roman Catholic seminary for the priesthood. He had academic and emotional problems and left the

school on academic probation early in 1965. Following the sinking, he returned to college and prepared to become a school teacher. His grades were almost all A's and B's and he received an excellent rating as a student teacher. He was virtually assured a position as a teacher upon graduation and his social life was normal in every respect, including romantic interests. He sought no medical attention. (For additional facts relating to Mulka, see Pet. pp. A15-A16 and, *infra,* pages A3 to A5.)

In spite of the above uncontradicted facts, Dr. Dillon, claimants' psychiatrist, testified that he found Mulka was suffering from a "moderately severe anxiety neurosis"; that he had deteriorated emotionally and scholastically since the sinking and that this deterioration would prevent him from maintaining a job as a school teacher and disable him, to some extent, in any other occupation he undertook. Dr. Dillon saw no need to change his diagnosis when, on cross-examination, he learned for the first time many significant facts such as Mulka's academic improvement upon his return to college after the sinking, his excellent rating as a student teacher and the fact he had sought medical attention for serious headaches and nervousness *prior* to the sinking but not thereafter.

In spite of the complete lack of any objective evidence to support the award and no other medical testimony, the District Court awarded Mulka $92,740.

The same pattern was repeated in case after case. (See summary of facts, *infra,* pages A1 to A19.)

Referring to the psychiatric testimony relating to Mulka and the other claimants, the Court of Appeals stated (Pet. p. A16):

> "Such factors form the basis for our dissatisfaction with this testimony, and applying the test of *Gypsum,* on the basis of the entire evidence, we

express a definite and firm conviction that a mistake has been committed."

The Court of Appeals went on to find that the psychiatric testimony was also inadmissible as a matter of evidentiary law and reversed and remanded for further proceedings.

Counsel for the Petitioners charges the Court below with "indirection" which resulted in "a total and substantial misuse of F.R.C.P. 52(a) and the 'clearly erroneous' rule as implemented and applied by this Court." (Pet., p. 10). If there was ever an instance of a direct and forthright application of the *Gypsum* test, it is to be found here. No appellate court is required, under the provisions of Rule 52(a), to accept findings simply because of the existence of some supporting testimony if, upon consideration of all of the testimony, the finding is unsupportable. There is nothing to the contrary in *McAllister v. United States, supra.*

The Petitioners cite several decisions in alleged support of their contention. We shall consider them, *seriatim.*

In *Grigsby v. Coastal Marine Service,* 412 F.2d 1011 (5th Cir.) (Pet., pp. 12-13), Judge Brown discusses the differing functions of the trial court and the reviewing court. He points out that the reviewing court should be slow to overturn fact decisions of the trial judge. The issue is whether the trial judge fairly weighed the matter and reached a conclusion that seems substantial and reasonable. The soundness of these statements cannot be disputed. They admonish against hasty rejection of findings, but most assuredly do not preclude such rejection and they require that the conclusions reached be "substantial and reasonable." If they are not, then the *Gypsum* test requires that they be vacated. The *Grigsby* case itself

provides support for this proposition since Judge Brown himself, after warning against a hasty rejection of findings vacated the judgment below and remanded on the issue of damages.

In *Carroll v. United States,* 133 F.2d 690 (2d Cir.) (Pet., pp. 13-14), the decision turned on whether an award of $5,000.00 to an injured seaman for pain and suffering was so excessive as to be "clearly erroneous." The court concluded that it was not and declined to interfere with that part of the award. It did, however, also conclude that the continuation of the war bonus for the seaman's working life was unwarranted and "clearly erroneous" and the award for loss of earning power was reduced.

The other decisions cited by Petitioners all involve the review of jury verdicts. Even in this area this Court, contrary to Petitioners' contention (Pet., p. 14), has not held that, unless there is a complete absence of evidence to support a jury's verdict, the appellate court may not interfere.

N.Y.C. & H.R.R. v. Fraloff, 100 U.S. 24 (1879) (Pet., p. 14) involved the refusal of a trial court to set aside a verdict and order a new trial. It is apparent from the opinion of this Court that the trial court found the verdict "was abundantly sustained by the evidence." (p. 31). Had the findings in the case at bar been abundantly sustained by the evidence, they would have been accepted by the Court below.

In *Lavender v. Kurn,* 327 U.S. 645, 653 (1946) (Pet. pp. 14-15), this Court stated that if there is a reasonable basis in the record for a conclusion reached by a jury and it is apparent to the reviewing court that such evidentiary basis exists, the reviewing court's function is exhausted. It follows that it is the obligation of the appellate court to be satisfied that the evidentiary basis does exist and

this necessarily involves an evaluation of the supporting evidence.

In *Sentilles v. Inter-Caribbean Corp.*, 361 U.S. 107, 110 (1959), this Court, in addressing itself to the question of the scope of judicial review in jury cases, said that "the focal point is the reasonableness of the particular inference or conclusion drawn by the jury * * *." Contrary to Petitioners' italicized statement that there was a "total absence of medical testimony" (Pet., p. 15), in the *Sentilles* case, two non-treating medical experts testified by way of hypothetical questions and one treating specialist testified, each with varying degrees of certainty, as to the causal connection between the trauma and the disease. The Court therefore ruled that the proofs justified the conclusions of the jury.

Mr. Justice Stewart in a short concurring opinion in the *Sentilles* case was of the firm opinion that the case should not have been reviewed on certiorari. At page 111 he said:

> "Cases like this, I am firmly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here. All this has been elaborated *in extenso* by others, and there is no point in repeating or paraphrasing their words. Suffice it to note that I agree with what they have said. See, *e.g., Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 524 (dissenting opinion); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 447 (dissenting opinion)."

Forty-seven years ago Mr. Justice Holmes, speaking for a unanimous Court, said in *United States v. Johnson*, 268 U.S. 220, at page 227:

"We do not grant a certiorari to review evidence and discuss specific facts."

The instant case involves, almost exclusively, the review of the evidence and the discussion of specific facts. The Court of Appeals scrupulously applied the proper standards of review and its decision should not be disturbed.

II. The Court of Appeals Correctly Ruled that the Testimony of Claimants' Psychiatric Expert Witness Was Incompetent Because it Was Based Wholly Upon Histories and Subjective Symptoms Allegedly Related by Claimants During Interviews in Anticipation of Trial and these Histories and Expert Testimony Were Substantially Inconsistent with Claimants' Sworn Testimony.

The Court of Appeals ruled that the testimony of claimants' psychiatric expert witness was incompetent because it was based wholly upon histories and subjective symptoms related to him solely for the purpose of his trial testimony and because such histories and subjective symptoms and the resulting expert opinion were substantially inconsistent with the claimants' own sworn testimony and the other uncontroverted evidence. Petitioners contend that this ruling was error and in conflict with decisions in other Circuits.

Petitioners err on both counts. First, the courts have universally held statements of history and of subjective symptoms to doctors in anticipation of trial and opinions based upon such statements, inadmissible. As stated by the Court of Appeals for the Second Circuit in *Grobelny v. W. T. Cowan,* 151 F.2d 810 (2d Cir., 1945), at page 812:

"The general rule is that self-serving statements are not admissible when made to a doctor who is not

called to treat a party to a lawsuit as a patient but only to examine him to determine his condition without an attempt to treat or cure. * * *"

Similarly, in *Atlantic Coast Line R. Co. v. Dixon*, 207 F.2d 899 (5th Cir., 1953), the Court of Appeals for the Fifth Circuit stated at page 903:

"* * * The rule both in Georgia and generally in the federal courts is that a physician's testimony as to statements of pain and suffering made by a patient to a physician not for the purpose of treatment but to qualify the physician to testify as an expert witness are generally inadmissible."

To the same effect, *Teti v. Firestone Tire and Rubber Co.*, 392 F.2d 294 (6th Cir., 1968), held at page 299 with reference to a non-treating physician:

"Unlike an attending physician, he cannot express an opinion based in whole or in part upon medical history furnished him by the patient."

See also *Globe Solvents Co. v. The California*, 167 F.2d 848, 859 (8th Cir., 1948); *Nashville C. & St. L. Ry. Co. v. York*, 127 F.2d 606 (6th Cir., 1942); *Chicago Railways Co. v. Kramer*, 234 Fed. 245 (7th Cir., 1916) and cases collected in 51 A.L.R.2d 1051, 1065.

The reason for the rule is clear and applies with equal force to any medical expert, including a psychiatrist, who examines a claimant in anticipation of trial. As stated in the *Grobelny* case at page 812:

"The general rule is that self-serving statements are not admissible when made to a doctor who is not called to treat a party to a lawsuit as a patient but only to examine him to determine his condition without an attempt to treat or cure. There is then no incentive to speak truly in order to give the doctor a true basis for diagnosis to enable him to pre-

scribe the proper medical treatment and there may be some inducement to distort facts for the purpose of a trial if one is in the offing."

This does not mean that a claimant is, in all circumstances, unable to get expert medical opinion testimony into evidence. If the testimony is that of a *treating* doctor, rather than an *examining* physician, the rule is equally well established that, since there is a strong motive for the claimant to tell the truth, the history and subjective symptoms related, although hearsay, can be introduced in evidence and opinions can be based upon them. This, of course, has no application to the instant case because the claimants here never sought treatment for the alleged psychiatric injuries sustained as a result of the sinking. As an alternative, facts can be presented to the expert for use in forming his opinion by means of a hypothetical question. See, e.g. *Nashville C. & St. L. Ry. Co. v. York*, 127 F.2d 606, 611 (6th Cir., 1942).

Neither of these alternatives was followed in the proceedings below. Instead, the claimants' psychiatrist was allowed to relate statements allegedly made to him by the claimants which bore no relation to the testimony of the claimants on direct examination [see, e.g., the statement by the Court of Appeals with respect to Mulka that the claimants' psychiatrist was not advised by Mulka of Mulka's academic improvement upon his return to college after the sinking, his excellent rating as a student teacher and of the fact that he had sought medical attention for serious headaches *prior* to the sinking (Pet., p. A16)] and to then base an opinion upon such inadmissible testimony.

The dangers inherent in a rule such as that urged by the Petitioners and avoided by the present rule are well illustrated by the facts of these claims where, as a re-

sult of claimants' psychiatrist being able to testify on the basis of the history and subjective symptoms related to him by the claimants, opinions were permitted in evidence which were so inconsistent with the objective facts of the lives of the claimants and the testimony of the claimants themselves as to make findings and awards based upon such testimony "clearly erroneous."

All of Petitioners' citations are consistent with the rule that the testimony of an expert witness must be based on facts otherwise properly in the record. In *Spillers v. Tri-State Glass-Lined Storage, Inc.*, 325 F.2d 322 (7th Cir., 1963) (Pet., p. 18) the expert was present in court when the plaintiff testified from the witness stand and the doctor then based his opinion upon this testimony. The Seventh Circuit expressly noted at page 326 that, unlike the testimony here, the expert's "opinion was not based on unsworn statements made in the absence of any opportunity for cross-examination."

The Seventh Circuit also cited with approval at page 326 the rule applied by the Court of Appeals below, and its own earlier rule in *Chicago Railways Co. v. Kramer, supra,* that such testimony is not permissible where based upon the self-serving, unsupported and unsworn statements of the claimant made out of court.

There is nothing in *Reid v. Quebec Paper Sales & Transportation Co.*, 340 F.2d 34 (2d Cir., 1965) (Pet., p. 18), that suggests any conflict with the Court of Appeals decision here. The incompetency and inadmissibility of the testimony of claimants' psychiatric expert in these claims arose out of substantial discrepancies, variances and inconsistencies between the bases used by the expert for his opinion and the uncontroverted facts brought out by the claimants' own testimony and the uncontroverted documentary evidence. The *Reid* decision does not involve any such issue.

The case of *Fuhrman v. Reading Co.*, _____F.2d_____ (3rd Cir., 1971) (Pet., p. 18A), is similar to the *Reid* case in that it does not address itself to the question in issue here. Apparently, in that case, the plaintiff testified to various facts and these were then presented to the medical expert so that an opinion was given based upon evidence already in the record. This bears no relation to the instant case where no hypothetical question was posed to the expert witness and, further, the subjective symptoms and history related by the claimants on the stand were inconsistent with the information relied upon by the claimants' expert in forming his opinion.

In *City-Wide Trucking Corp. v. Ford,* 306 F.2d 805 (D.C. Cir., 1962) (Pet., p. 18) the question was whether an examining expert might testify to *objective* findings made during the course of an orthopedic examination and base an opinion on these findings; this question has no relevance to the claim of Petitioners here that an examining doctor can testify to and base an opinion upon *subjective* symptoms and a patient's history.

In *Kaufman v. Kaufman,* 164 F.2d 519 (D.C. Cir., 1947) (Pet., p. 19), the physician testifying was apparently the treating physician and statements made to such physicians constitute a common exception to the hearsay rule; again, Petitioners' citation has no relevance.

Petitioners refer to the preliminary draft of the *Proposed Rules of Evidence for the United States District Court and Magistrates* and proposed Rule 7-03. Petitioners' citation of this proposed rule is significant in two regards. First, it should be carefully noted that the proposed Rule 7-03 *will not* change the rule followed by the Court of Appeals below because facts and data not otherwise admissible in evidence on which an opinion or inference may be based can only include those "of a type

reasonably relied upon by experts." Statements of subjective symptoms and history made in anticipation of trial to prepare a doctor to testify are not "reasonably relied upon." The proposed rule is nothing but a codification of the present state of the law.

Petitioners' reference to the *Proposed Rules* also points up the fact that the question which they would have the Court resolve will shortly become moot if the *Proposed Rules* are adopted. Moreover, consideration of this question would not affect the result in the instant cases because the testimony of claimants' psychiatric expert was found not only inadmissible, but was also rejected by the Court of Appeals pursuant to the test of *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948) (Pet., pp. A14-A16). In short, consideration of this question would have only limited import.

III. Petitioners Misstate the Ruling of the Court of Appeals on the Question of Loss of Earning Capacity in an Attempt to Create an Illusion of Conflict Between the Circuits Where, in Fact, None Exists.

Petitioners' third argument is based upon a misstatement of the decision of the Court of Appeals on the question of earning capacity. The misstatement is calculated to create an illusion of conflict between the circuits where, in fact, none exists.

Petitioners state that the rule in the Sixth Circuit is that earning loss is to be measured by the "higher of the year immediately preceding the incident or the average of the four years preceding it" (Pet., p. 23). Petitioners then state (Pet., p. 23):

> "No effect, said the Court, is to be given to any other factor, even if the record be replete with the

> same, as in the instant case. This rule is completely erroneous, since it measures loss of earnings only, not loss of earning *capacity,* and is in specific conflict with the rule applied in other Circuits."

In making these remarks, Petitioners do not purport to quote from the opinion of the Court of Appeals. This is because Petitioners' remarks bear no resemblance to what the Court of Appeals actually stated on the question of compensation for loss of earning capacity.

The Court of Appeals stated specifically and clearly that the question to be decided is the amount of "earning capacity," if any, sustained by a claimant as a result of his alleged injury. The Court of Appeals cited its earlier decision in *Imperial Oil Ltd. v. Drlik,* 234 F.2d 4 (6th Cir., 1956) and, specifically, the rule as stated on page 11 of that decision (Pet., p. A28):

> "One who is injured in his person by the wrongful act of another may recover loss of time resulting therefrom and consequent loss of earnings, including future earnings provided they are shown with reasonable certainty and are not merely speculative in character. The measure of damages in this field is fairly definite, and the amount awarded is controlled by what the evidence shows concerning the *earning capacity* of the injured person before and after the accident." (Emphasis supplied.)

The Court of Appeals then went on to note specifically that the prior earnings record of an individual is not conclusive on the question of the amount to be awarded for lost earnings. The Court stated that (Pet., p. A29):

> "During one's progress through the working years of life his income normally shows at least some annual increase, with normally no decrease except as may be occasioned by personal or economic adversity until his declining years."

It also recognized the possibility that there might be other (Pet., p. A30):

> "* * * evidence of special circumstances indicating an ability to rise beyond his prior level of employment. * * *"

Accordingly, the Court ruled that the determination of lost earnings was to take into account all available data relevant to wage adjustment (Pet., p. A30).

The Court then continued (Pet., p. A30):

> "Where a past period is involved, *in the absence of an affirmative showing to the contrary,* the best evidence of earning capacity is the individual's actual earning record." (Emphasis supplied.)

Further, the Court stated that where a claimant seeks to claim lost earnings with respect to the future other than those indicated by his actual earning record, he must establish what his earning capacity would have been and then establish the reduction, if any, in his earning capacity resulting from the injury. (Pet., pp. A30-A31).

There is nothing inconsistent in the foregoing with any of the decisions cited by the Petitioners. Petitioners summarize the decisions cited by them at page 28 of their Petition as holding that "earning capacity means earning *power,* not mere earnings; and that *all* factors relevant to the claimant's economic future must be considered." This is precisely the rule of the Sixth Circuit.

Petitioners' difficulty in the Court of Appeals on this question resulted not from the Sixth Circuit adopting a rule contrary to or in conflict with that of the other Circuits, but from the fact there was no evidence of any earning capacity on the part of any of the claimants other than that indicated by their past earnings.

In the case of the personal injury claimants, a comparison of their earnings after the sinking with earnings prior to May 7, 1965 demonstrated there had been no lost earnings at all since the average earnings of all claimants in the years of 1965-1967 were higher than their earnings prior to May 1965.*

Further, the 1965 to 1967 figures represented full employment. In the three years from 1965 to 1967, except for a few days while the claimants awaited reassignment, six of the seven claimants missed no time from work due to any condition which allegedly resulted from the sinking. The single exception, Holley, missed fourteen days of the summer of 1965 and lost no time for sailing thereafter. Since all of these claimants were fully employed in the years from 1965 to 1967, with no time off work, there is no evidence to support any possibly higher earnings than their actual earnings for these and future years.

In the death cases, on the evidence, the conclusion of the Court of Appeals was, if anything, too generous to the claimants. In the year preceding the sinking, 1964, Fuhrman, Jones and Haske each earned less than in preceding years (see page A20). Further, Haske had reached the highest position for which he was qualified and, as found by the District Court, he appeared "by his life and study habits not to have the desire to go any higher on the employment ladder" (103). Jones was a stokerman on May

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*

	Actual Average Gross Earnings (1961-1964)	Actual Average Gross Earnings (1965-1967)
Holley	$ 7,671.50	$ 8,736.08
Adalski	13,651.72	14,422.59
Kierzek	3,403.84	6,741.00 **
Mulka	—	6,100.00 **
Piechan	9,685.22	10,156.01
Przybyla	6,465.85	7,145.49
Tulgetske	18,147.33	20,949.84

** Projected.

7, 1965, the same job he had held for 20 years. In the case of Fuhrman, the District Court stated "the chances of his rising on the employment ladder were limited" (97-98). Nevertheless, the Court of Appeals assumed annual earnings increases for each of these men. Moreover, the earnings award was further indirectly increased by the refusal of the Court of Appeals to take a deduction from earnings for the effect of income and other taxes or for the social security benefits received by the claimants as a result of the deaths of their decedents.

Petitioners refer to a purported "analysis" of collective bargaining agreements as "evidence" to support the awards made by the District Court. This so-called "analysis" was fallacious on its face because of numerous errors in its preparation such as the assumption of a twelve-month sailing season although the sailing season on the Great Lakes is only nine months, inclusion of vacation and holiday pay and sickness and accident benefits even though full employment was otherwise assumed, thus leading to a duplication of recoveries, the assumption that the claimants would have continued to sail for the balance of their life expectancies instead of to age 65, when retirement was mandatory at U. S. Steel, etc.

Petitioners' "analysis" was so erroneous it was rejected by the District Court when it made its awards for loss of earnings capacity (86):

> "Note that we did not use what Claimants emphasized was their annual earning capacity—the work contract rates at which each was entitled to, but which each did not necessarily exercise. Work habits—not contract rights—determine loss of earning capacity."

"Earning capacity" may be distinguished from "earnings" when there is evidence indicating they are in some

way different; however, in this case, there was no such evidence and the Court of Appeals properly looked to the claimants' past earnings records to determine loss of earning capacity, if any.

There is no conflict with other Circuits in this approach since all Circuits accept the principle that awards for lost earnings are not to be plucked from thin air, but are to be supported by the evidence. Thus, in *Thompson v. Trent Maritime Co.*, 353 F.2d 632 (3rd Cir., 1965) cited at page 25 of the Petition, the Court noted at page 635 that an award for loss of earnings might be proper even where a claimant earned more in the year of the injury than in previous years *only if the evidence showed that he could have earned a larger amount had he not been injured.* To the same effect, see *Tullos v. Corley,* 337 F.2d 884 (6th Cir., 1964).

The difficulty of the Petitioners here resulted not from any rule in the Sixth Circuit prohibiting awards of loss of earning capacity based on evidence other than that of past earnings, but the complete absence of any such credible evidence in the record. The decision of the Court of Appeals should not be disturbed.

IV. The Court of Appeals Correctly Applied the Decision of this Court in Michigan Central R.R. v. Vreeland, in Considering Awards for Loss of Consortium, Care and Guidance to Widows.

Contrary to Petitioners' assertions, the Court of Appeals did not misconstrue this Court's decision in *Michigan Central R.R. v. Vreeland,* 227 U.S. 59 (1913), in considering awards to widows for loss of consortium, care and guidance.

In the *Michigan Central* case this Court stated at page 73:

> "A minor child sustains a loss from the death of a parent, and particularly of a mother, of a kind altogether different from that of a wife or husband from the death of a spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard."

It then went on at pages 72 to 74 to state that a proposed instruction to a jury that it could compensate a widow for the value of the "care and advice" of her husband, if he had lived, "threw the door open to the widest speculation." The Court found that the loss of a husband's care and advice to a widow was "not capable of being measured by any material standard" and held that it was error to allow the possibility of recovery for this item of damages.

Petitioners quote from portions of the *Michigan Central* decision which have no relevance to the proposition they urge. The quotation from the *Michigan Central* decision at pages 29 to 30 of the Petition is not concerned with a possible award for loss of consortium, care and guidance to a widow, but rather with awards for loss of a husband's services, such as carpentry work performed around the house. Awards were made in the District Court for loss of a husband's services and no objection was raised to these on appeal. However, an award to a widow for loss of consortium, care and guidance presents quite a different question.

When those portions of the *Michigan Central* decision which are relevant to the question of awards for loss of consortium, care and guidance are considered, it is apparent that, as stated by the Court of Appeals, this decision (Pet., p. A46):

> "* * * must be read as limiting an award for loss of care and guidance to those cases in which the services of the decedent constituting such care and advice can be enumerated and their replacement value estimated. Here there was no evidence of the nature of the care, guidance or counsel which the decedents gave to their wives prior to their deaths which could 'only be supplied by the service of another for compensation,' much less any showing that any such care or counsel had any pecuniary value. Under such circumstances the award was improper and must be vacated. Cf. *First National Bank of Greenwich v. National Airlines, Inc.*, 288 F.2d 621 (2d Cir.), cert. denied, 368 U.S. 589 (1961); *Meehan v. Central R.R.*, 181 F. Supp. 594 (S.D.N.Y. 1960)."

This Court's decision in *Michigan Central* has been similarly interpreted and followed by all lower courts in every circuit in disallowing such awards.

As pointed out by the Court of Appeals in its decision and not controverted by Petitioners (Pet., p. A44):

> "Since the Supreme Court's decision in *Michigan Central*, no case arising under the Jones Act to which we have been referred by the parties or which has been disclosed by our own research has permitted an award for the loss to the widow of the decedent's care and guidance. *See e.g., Petition of Marina Marcante Nicaraguense, S.A.*, 248 F. Supp. 15 (S.D. N.Y. 1965), *modified* 364 F.2d 118 (2d Cir. 1966); *Petition of Oscar Tiedemann & Co.*, 236 F. Supp. 895 (D. Del. 1964); *Petition of Petroleum Tankers Corporation*, 204 F. Supp. 727 (S.D. N.Y. 1960); *Petition of Moore-McCormack Lines, Inc.*, 184 F. Supp. 585 (S.D. N.Y. 1960), *modified sub nom., Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2d Cir. 1961)."

The Court of Appeals further noted, without contradiction by Petitioners, that the general maritime law

does not recognize awards for loss of consortium to widows as an element of pecuniary loss (Pet., pp. A46-47), citing in support *Igneri v. Cie de Transports Oceaniques,* 323 F.2d 257 (2d Cir. 1963) cert. den. 376 U.S. 949 (1964).

The Court of Appeals for the Second Circuit in *Igneri,* in an exhaustive analysis of the common law and maritime law pertaining to loss of consortium, stated under the reasoning of the *Michigan Central* case at page 266:

> "And it is established also that the damages recovered by a seaman's widow suing for wrongful death under the Jones Act do not include recovery for loss of consortium."

That same Court held in *Middleton v. Luckenbach S.S. Co.,* 70 F.2d 326 (2d Cir., 1934) that under the Death on the High Seas Act, 46 U.S.C. § 761, the widow cannot recover damages for loss of her husband's society and companionship.

See also *Valitutto v. D/S I/D Garonne,* 295 F. Supp. 764 (S.D.N.Y., 1969) and *Simpson v. Knut Knudsen, O.A.S.,* 296 F. Supp. 1308 (N.D. Cal., 1969) where those Courts similarly held awards for loss of consortium were not allowable under the general maritime law.

The Court of Appeals correctly applied the principles of this Court established in *Michigan Central* and uniformly followed in all subsequent cases that under the general maritime law and the Jones Act no awards are recognized for loss of consortium, care and guidance to widows.

V. The Court of Appeals Correctly Ruled that Awards for Future Losses Are to be Discounted to Present Value in Accordance with This Court's Decision in Chesapeake & Ohio Ry. v. Kelly.

After torturing *Michigan Central R.R. v. Vreeland*, 227 U.S. 59 (1913) beyond recognition in their search for a plausible basis for their Petition, Petitioners next turn their attention to the equally longstanding and time honored decision of *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916). In that case, this Court held that awards of future losses are to be discounted to present value, stating at page 490:

> "* * * [A]s a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in making up the award."

Petitioners take this clear and straightforward proposition and attempt to twist it to support just the opposite conclusion, that future losses should *not* be discounted to present value. They then argue that the decision of the Court of Appeals, which followed the clear meaning of the *Kelly* case, is in conflict with that decision.

There is no conflict. The Court of Appeals decision that the awards of future damages are to be discounted to present value is consistent with the *Kelly* case and every other decision of record to the present time.

What Petitioners really object to is the holding of the Court of Appeals that the District Court committed error in refusing to discount future damages to present value in accordance with the *Kelly* case because of an alleged prospective future "loss of dollar purchasing power" due to inflation.

The District Court, on the one hand, found that the awards of future damages were to be discounted to present value on the basis of the earning power of money in non-inflationary times (i.e., a rate of 4% per annum).

No consideration was given to the effect of inflation upon the earning power of money even though, at the time this case was pending before the District Court, the prime lending rate was 8½% and the yield on AAA corporate bonds of companies such as Consolidated Edison was in the neighborhood of 8½% to 9½%.

Then, having ignored the possible effects of inflation upon the *earning power* of the dollar, the District Court in effect took judicial notice that there would be inflation at a rate of 4% per annum indefinitely into the future, found that this would result in a loss of dollar *purchasing power* at 4% per annum and concluded that the earning power of the dollar (which had been established without consideration of the effects of inflation) would be completely offset by a loss of dollar purchasing power due to inflation.

Because of this contradictory approach, because the question of the purchasing power of money is inextricably interwined with other complex and speculative economic phenomena which must also be considered, once the question of inflation is introduced, and because of the inherently speculative nature of an inquiry into the possible effects of future inflation, i.e., the earning and purchasing power of a dollar at any given future period of time might either increase or decrease, the Court of Appeals followed its rule in *Sleeman v. Chesapeake & Ohio Ry. Co.*, 414 F.2d 305 (6th Cir., 1969), that the present value adjustment called for by the *Kelly* case is to be made without any offset for any assumed inflationary or deflationary trend,

either upon the earning or the purchasing power of the dollar.

In the *Sleeman* case, the Court stated at page 308 that it did not

> "encourage the trial courts of this circuit to explore such speculative influence on future damages as inflation and deflation."

and continued:

> "[T]he inflation v. deflation debate rages inconclusively at the highest policy levels of our government, in national or electoral campaigns, learned economic journals and is exemplified in the daily gyrations of the stockmarkets. Debate seems unlikely to be resolved satisfactorily in one personal injury trial. And if testimonial resolution of this factor bearing on the future is attempted, the door is open to similarly speculative and debatable off-sets tending in their directions."

The Court of Appeals for the Second Circuit in *McWeeney v. New York, N. H. & H. R.R. Co.*, 282 F.2d 34 (1960), in discussing the effect of inflation, stated at page 38:

> "* * * there is little or no authority in favor of charging the jury to take future inflation into account, see 2 Harper and James, The Law of Torts, § 25.11 (1956)."

Similarly, in *Armentrout v. Virginian Ry. Co.*, 72 F. Supp. 997 (D.C. S.D. W. Va., 1947), cited with approval in the *McWeeney* case, the Court stated (at page 1001):

> "It is possible, of course, that values may cease to be affected by inflation of the currency. Economic conditions may conceivably cause the value of the dollar again to rise to the point where it stood before the World War II. On the other hand, there is no assur-

> ance that its value may not become less as time goes on. This possibility balances, if it does not outweigh, the contrary forecast. It would be, I think, mere speculation to adopt either theory as the foundation of an estimate of future earnings."

The Court of Appeals adopted the same reasoning it applied to the issue of inflation in considering the question of whether a deduction should have been taken from assumed future earnings for future income taxes. The court held that no adjustment for the impact of income taxes upon an award for loss of earning capacity was to be made

> "* * * because the impact of such future taxes can not be predicted with reasonable certainty * * *" and any adjustment "* * * must constitute mere speculation on the part of the trier of fact." [Pet., p. A38.]

Petitioners claim that there is evidence in the record below on inflationary trends and point to the District Court's reference to the *Economic Report of the President to the Congress,* January 1969. Petitioners claim the District Court took "judicial notice" of this document. Petitioners' point, of course, ignores the fact that the Court of Appeals reversed the District Court not only for lack of evidence, but also because of the District Court's inherently contradictory approach to the question of the effect to be given inflation and its refusal to follow the *Sleeman* case. However, Petitioners also misrepresent the state of the evidence when they suggest there was evidence in the record on the effects of inflation.

The *Economic Report of the President* was *not* judicially noted and was never made a part of the record or evidence of the proceedings below, but was merely referred to by the District Court in its opinion. Further,

facts regarding inflation, including the precise rate of future inflation, are not a proper subject for judicial notice. As the Court stated in *Alvary v. United States,* 302 F.2d 790 (2d Cir., 1962), at page 794:

> "On fact questions the Court should not use the doctrine of judicial notice to go outside the record unless the facts are of matters of common knowledge or are capable of certain verification. See, e.g., *Brown v. Piper,* 91 U.S. 37, 42, 23 L. ed. 200, 1875; *McCormack on Evidence,* Chapter 37 (1954)."

The nature of inflation and its effects upon the economy in the future, and on the earning and purchasing power of money, are most certainly not "matters of common knowledge * * * capable of certain verification."

There was no justification for the District Court ignoring the effect of inflation upon the earning power of money and then off-setting the discount called for by the *Kelly* case by reason of the alleged effect of inflation upon the purchasing power of the dollar, either as a matter of law or upon the evidence. The Court of Appeals was correct in reversing the District Court and remanding the case with the direction that the District Court is to discount the awards for future damages to present value in accordance with generally accepted actuarial principles and the *Kelly* case.

VI. The Decision of the Court of Appeals that an Award of Prejudgment Interest Would Amount to an Abuse of Discretion Is Consistent With the Decisions of the Court of Appeals for the Second Circuit.

Petitioners' final argument is that certiorari should be granted because the decision of the Court of Appeals on the question of prejudgment interest is in conflict with the rule of the Court of Appeals for the Second Circuit.

Petitioners misstate the rule of the Second Circuit as reflected in cases such as *Petition of City of New York*, 332 F.2d 1006 (2d Cir., 1964), cert. den. sub. nom. *City of New York v. Bernstein*, 279 U.S. 922 (1964), and *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583 (2nd Cir., 1961), cert. den. 368 U.S. 989 and 370 U.S. 937 (1962). Petitioners construe these decisions as requiring mandatory awards of prejudgment interest in admiralty in all cases. This is incorrect.

The rule in all circuits is that of *The Scotland*, 118 U.S. 507 (1886) where this Court stated at pages 518 to 519:

> "The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has had to pass upon the subject, whether it be a court or a jury."

The Second Circuit has followed *The Scotland*. In the *Richardson* case, the Court of Appeals for the Second Circuit stated at page 593:

> "Under admiralty practice, the District Court has a measure of discretion in allowing and fixing moratory interest."

In the *Richardson* case there was no award of prejudgment interest to the personal injury claimants (p. 592, n. 5) and the Court noted that the admiralty courts do not go so far as New York state courts and give prejudgment interest in death claims from the date of death as a matter of right, but have discretion to refuse awards of prejudgment interest (p. 594, n. 14a).

See also *The Wright*, 109 F.2d 699 (2d Cir., 1940), where the Court stated at page 702:

"It is stated repeatedly that the award of interest in admiralty is a matter of the Court's discretion."

There is nothing in *Petition of the City of New York* inconsistent with these cases and, in fact, both are cited with apparent approval at page 1008 of the *City of New York* case.

Further, in two recent cases subsequent to all of these decisions, *LaCapria v. Compagnie Maritime Belge,* 286 F. Supp. 980 (S.D.N.Y., 1968), aff'd. 427 F.2d 244 (2d Cir., 1970) and *Candiano v. Moore-McCormack Lines, Inc.,* 251 F. Supp. 654 (S.D.N.Y., 1966), aff'd. 382 F.2d 961 (2d Cir., 1967), cert. den. 390 U.S. 1027 (1968), the District Courts denied awards of prejudgment interest to the plaintiff longshoremen as a matter of discretion and these decisions were affirmed by the Court of Appeals for the Second Circuit.

The Court of Appeals for the Sixth Circuit follows the rule that the question of prejudgment interest is a matter for the discretion of the Court. See *Reiss Steamship Company v. United States Steel Corporation,* 427 F.2d 1152 (6th Cir., 1970) at pages 1153 to 1154 and *Monsanto Chemical Co. v. No. 3 Bull Towing Company,* 326 F.2d 18 (6th Cir., 1963). It also correctly decided that, in this case, where discovery on issue of compensatory damages was delayed at the instance of the claimants, where most of the claims were settled on terms described by the District Court as "generous" long prior to judgment, and where the District Court itself specifically found that the shipowners proceeded expeditiously and did not need the discipline of a prejudgment interest penalty, any award of prejudgment interest would amount to an abuse of discretion. *Cleveland Tankers v. Tierney,* 169 F.2d 622 (6th Cir., 1948).

There is no conflict here with the Court of Appeals for the Second Circuit. Both circuits follow the rule of this Court in *The Scotland*.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LUCIAN Y. RAY,
ROMAN T. KEENEN,
Attorneys for Respondent United States Steel Corporation.

Of Counsel:

McCREARY, RAY & ROBINSON.

JOSEPH KEIG, JR.,
THOMAS O. MURPHY,
JONATHAN G. BUNGE,
Attorneys for Respondent Den Norske Amerikalinje, A/S.

PRICE, CUSHMAN, KECK & MAHIN,
JOHNSON, BRANAND & JAEGER.